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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAIME BARAJAS, Defendant and Appellant.	B171761 (Los Angeles County Super. Ct. No. VA070525)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Affirmed as Modified.

Harold Greenberg and Carlo Fisco for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

Appellant, Jaime Barajas, was convicted by a jury of the first degree murder of Arthur Santa Anna, having caused the victim's death by the personal and intentional use and discharge of a firearm, committed for the benefit or direction of, or in association with a criminal street gang, with specific intent to promote, further and assist in criminal conduct by gang members. In addition, appellant was convicted of possession of a firearm by a felon. Appellant waived a jury trial on an allegation that he had suffered a prior felony conviction, and the trial court found the allegation to be true. On November 14, 2003, appellant was sentenced to 75 years to life plus 16 years in prison, and he filed his notice of appeal the same day.

DISCUSSION

1. *Victim's Hearsay Statements*

Citing the recent United States Supreme Court decision in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), appellant contends that the judgment must be reversed, because the trial court allowed the testimony of Deputy Sheriff Sergio Peralta to the effect that the victim had admitted to him, sometime prior to his death, that he was a member of the Pico Nuevo (or "P.N.") Gang, and that he was a member of a tagging crew (a group of graffiti writers), associated with that gang.

In *Crawford*, the Supreme Court held that testimonial statements of witnesses absent from trial may be admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the declarant. (*Crawford*, *supra*, 541 U.S. at pp. ___, 124 S.Ct. at pp. 1369-1370, 1374.) Thus, the admission of a hearsay statement, even if deemed admissible under some exception to the hearsay rule, may violate the confrontation

clause of the Sixth Amendment to the United States Constitution but only if the statement is "testimonial." (*Ibid*.)

The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Crawford*, *supra*, 541 U.S. at pp. __, 124 S.Ct. at p. 1374, fn. omitted.)[1]

Appellant contends that the victim's statements to the deputy were testimonial, and respondent asserts that they were not testimonial.

Peralta testified that he had heard that Santa Anna belonged to the tagging crew U.N.S., which was affiliated with the Pico Nuevo Gang. Peralta had stopped Santa Anna twice for truancy near the high school to which Peralta was assigned, and on one of these occasions, after Peralta confronted him about what he had heard, Santa Anna admitted to being involved with the group. About two weeks before his death, Santa Anna admitted to Peralta that he was a member of Pico Nuevo.

Santa Anna's first admission, that he was part of a tagging crew, may be interpreted as a response to a "police interrogation," but the circumstances of his

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[1] Defining statements to the police as "testimonial" has engendered much disagreement among the California courts of appeal, and the question is now before our supreme court in several cases. (See e.g., *People v. Giles* (2004) No. B166937, review granted Dec. 22, 2004, No. S129852 [victim's statements to police in prior domestic violence investigation.]; *People v. Adams* (2004) 120 Cal.App.4th 1065, review granted Oct. 13, 2004, No. S127373 [police interview with victim]; *People v. Cage* (2004) 120 Cal.App.4th 770, review granted Oct. 13, 2004, No. S127344 [spontaneous statement by victim to police at hospital]; see also *People v. Kilday* (2004) No. A099095, review granted Jan. 19, 2005 [victim's statements to investigating officers].)

admission to being a gang member are wholly unknown. We decline to join the fray by attempting to define "testimonial" in relation to statements made to the police. We shall assume for purposes of this discussion that Santa Anna's statements to Peralta were "testimonial" in nature, and that admitting the evidence was constitutional error, requiring reversal unless we find the error to be "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

To determine whether error was harmless, we consider all of the evidence heard by the jury at trial. (*People v. Harris* (1994) 9 Cal.4th 407, 428.) We must reverse if we determine that "[t]he alleged statements clearly bore on a fundamental part of the State's case [and] 'added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' [Citations.]" (*Douglas v. Alabama* (1965) 380 U.S. 415, 420.)

Damien Santa Anna testified that Arthur Santa Anna, whose nickname was "Tudy," was his cousin.[2] On April 3, 2002, Damien and his cousin were walking on Coffman-Pico Street to a friend's house, when a van pulled up near them, and one of the several occupants called, "Tudy." Damien could not see who was inside, but saw that there were four or five occupants, all males with bald heads. After Santa Anna approached the van, the front passenger emerged and asked Santa Anna if he was from "P.N.," or he might have asked, "Where are you from?" Damien interpreted the question as asking if he was a gang member. He explained that P.N. means the Pico Nuevo Gang, which he knew because he had relatives who were members. Santa Anna replied, "I don't bang. I'm not from nowhere."

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[2] We shall refer to Damien Santa Anna by his first name to avoid confusing him with the victim, to whom we shall refer as Santa Anna.

Damien testified that the passenger then said, "Fuck you," and pulled a gun from his waistband. Damien and Santa Anna began to run away, but had gone only about nine feet before Damien heard two shots, turned and saw his cousin lying on the ground wounded. The shooter stood right over Santa Anna and shot him three or four more times from about a foot away, pointing the gun straight at him. Just before he fired, he looked at Damien and nodded, then went back to the van without saying anything more.

At trial, Damien denied knowing who the shooter was or ever having seen him before, but he admitted having told the investigating officers and having testified at preliminary hearing that the shooter was appellant. Damien had known appellant in middle school, where appellant was his cousin's friend, knew that appellant's nickname was Boxer, and he was able to identify appellant in court. Damien had testified at preliminary hearing that the shooter was appellant, that he had a tattoo on his lip, a laugh on his face, and that he was smirking when he shot his cousin. When asked at trial what the shooter looked like, Damien testified, "I don't know," but then described him as male with a bald head and no tattoos.

Damien admitted having identified appellant as shooter to police the day of the shooting, and having picked appellant's photo from a photo show-up. He also admitted having told Detective Ramirez that the shooter said, "Fuck you, this is Rivera," rather than simply, "Fuck you," as he testified at trial. Damien also admitted knowing that appellant was from the Rivera gang, and that Rivera and P.N. do not get along, but he denied that the shooter mentioned Rivera.

Damien claimed at trial that he did not remember what the shooter looked like, but conceded that he was sure on the day of the shooting that it was appellant. And he had no doubt when he identified appellant. Indeed, at the preliminary hearing, he pointed at appellant when asked to identify the shooter, saying, "That little bitch right there." When asked at trial why he called him that, he replied, "I

don't know." Finally, Damien positively testified at trial that appellant did not shoot his cousin.[3]

Very soon after the shooting, at 2:52 p.m., Deputy Sheriff Cindy Munguia was one of the first peace officers to arrive at the scene, and she spoke to Damien within minutes after arriving. He was hysterical when she arrived, and a few minutes later, while still upset, Damien told her the shooter was "Boxer," whose name was Jaime, a person he had known at school. She reported to Detective Ramirez what Damien had said to her.

Detective Ramirez was the investigating officer in this case. He testified that he interviewed Damien at the station on day of shooting. He recorded the interview because the shooting appeared to be gang-related, and it is not uncommon for a witness to recant his testimony in gang cases. He showed Damien a "six-pack" photographic show-up. Damien identified appellant as the shooter, and said he had "no doubt," that he had gone to junior high school with him. Prior to being shown the show-up, Ramirez asked Damien if he knew the name of the shooter, and Damien said, "Jaime." He was certain. Damien also told Ramirez that appellant had said, "Rivera," just before the shooting.

Damien was not the only witness who identified appellant. An ambulance happened to be stopped at a red light at the time of the shooting, and was close enough for the medical attendant, Humberto Oseguera, to see the shooting. While stopped at the light, Oseguera heard two or three pops, he looked out the window, thinking they had blown a tire, and saw a young person in the middle of the street, another person on the ground, and a third person standing over him with a handgun, firing shots into the victim. Oseguera then observed the shooter run to a

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[3] In the hallway during a break in his testimony, Damien told Detective Richard Ramirez that he did not want this to "fall back on him."

large van and enter at the passenger side. He identified appellant in court as the shooter.

Oseguera went to Santa Anna's assistance, while the ambulance driver called 911 before coming to help. They began basic life support, but there were multiple gunshot wounds and a lot of blood, and it was apparent that Santa Anna would not survive. Deputy Medical Examiner Jeffrey Gutstadt testified that there were four fatal gunshot wounds. One probably disabled the victim, causing him to fall face down, and two wounds in the victim's back were consistent with the shooter's having stood over him as he lay on the ground.

Oseguera testified that the police arrived very quickly, and that after about three hours at the scene, he went to the police station to be interviewed by Detective Ramirez and his partner. He was shown a 6-photograph show-up and picked appellant's photo as the shooter. He told the detectives that he had been able to get a good look at the side of the shooter's face while he was shooting, and at his full face when he approached the van. He described the shooter to the detectives as 20 to 21 years old, 5 feet 9 inches or 5 feet 10 inches, medium complexion, shaved head, wearing a white shirt and oversized Levis.[4]

At trial, Oseguera thought the photograph appeared to be the shooter, not just because of shaved head, but also because of his *light* complexion He could not remember what he told the detectives about facial hair or whether he had said the shooter appeared to weigh 200 pounds, and he testified that he did not think that the shooter weighed 200 pounds. Oseguera could see that appellant had a tattoo on his face at trial, but could not remember seeing it at time of the shooting.

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[4] Appellant was 19 years old at the time of the shooting, 20 at the time of trial.

Deputy Sheriff Ramon Lascano testified that he responded to the scene of the shooting and spoke to Oseguera in order to obtain general information for the detectives. He took a preliminary statement in which Oseguera described the shooter as male Hispanic, 5 feet 10 inches, 200 pounds, with shaved head, and wearing a white T-shirt. Oseguera did not mention tattoos or facial hair. Detective Ramirez testified that Oseguera had estimated the shooter's weight as 200 pounds, but added that in his experience in hundreds of investigations, height and weight estimations by witnesses are often not very accurate.[5]

Another witness, Kevin Palmer, saw the shooting while driving along Rosemead Boulevard. He was interviewed by officers the same day, but was unable to identify a suspect or give a description.

Sheriff's Department Sergeant Albert Palaez and Detective Ruben Nava testified as the prosecution's experts on criminal street gangs operating in Pico Rivera, where the shooting took place. Both had been assigned to Operation Safe Streets, or OSS, a gang investigative team working out of the Pico Rivera Sheriff's station. Palaez had been with the Sheriff's Department for 24 years and Nava for 16 years.

Based upon his experience with appellant, appellant's admission to another officer, and the Department's gang information files, Palaez was of the opinion that appellant was a member of the Rivera 13 Gang.

Nava had grown up near gang members, had taken additional training in street gangs and subcultures, and had extensive experience with local street gangs. He testified that the Rivera 13 Gang was a criminal street gang, and that its rivalry with the Pico Nuevo Gang had been going on for many years. Indeed, its greatest

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[5] We have found no evidence of appellant's height or weight in the record, other than Oseguera's description.

rivalry is with Pico Nuevo or P.N. Rivera 13 members have committed murders, rapes, burglaries, carjacks, auto theft, assaults with deadly weapons, attempted murders, and narcotics offenses. In 2001, a Rivera member was killed by a P.N. member. Shootings may occur when one gang member walks through another's territory.

Nava testified that gang members commonly have tattoos to demonstrate their commitment to their gang. Nava has come to understand gang tattoos by making a habit of complimenting the tattoos of known gang members, which usually evokes an explanation of what their tattoos mean, and how they came to get a particular tattoo. With a photograph of appellant, Nava explained the significance of appellant's tattoos. The three dots near his eye and three dots on his knuckles represent his life style as a gang member; "Rivera Viejo" on his upper lip and "R13" on the back of his right ear stand for his particular gang and clique; and "Rivera" on his chest signifies his allegiance to his gang.

Nava testified that many gang-on-gang crimes are not solved, because people in the community are reluctant to come forward out of fear perpetuated by gang members throughout the community. Many such crimes go unreported for that reason, or witnesses refuse to testify for fear of retaliation. It is difficult to persuade victims, even rival gang members, to testify or identify a gang member who has assaulted them. Gang members do not want to be labeled a "snitch," because their own gang will shun or blackball members seen as snitches. In gang culture, it is the gang's role to retaliate for wrongs committed against their members.

Appellant presented an alibi defense. Arthur Aguirre testified that he was the owner of a termite company, and had been a licensed inspector for three years. In 2002, an acquaintance or acquaintances, whom Aguirre described first as a friend, then cousins, then associates, asked him to hire appellant. Later in his

testimony, he clarified that the person who introduced them was David Vargas, his friend for about 25 years, and a business associate. Aguirre testified that he was not aware of how Vargas knew appellant, and that he knew appellant was in a gang, but thought he was trying to change.

Aguirre hired appellant as a trainee, but asked him to grow his hair and a mustache to cover the lip tattoo, in order to look more professional. In the meantime, appellant wore a hat, as they usually do anyway in his work. Aguirre estimated appellant's hair length at the time he was arrested to have been about the length of a crew cut.[6] According to Aguirre, appellant took a required test at the Agricultural Board, passed the first time, and was given a temporary license. The permanent one was sent or emailed to the office.[7] Aguirre paid appellant in cash.

Aguirre remembers April 3, 2002, because on April 4, 2002, appellant asked him to come with him to see his parole officer, in order to introduce him and let him know he was working. When they arrived, appellant went into his parole agent's office, and Aguirre was told to have a seat. After he had waited for about 20 minutes, two officers came out and told him that appellant was going to be arrested for an attempted murder the day before around 3:00. Aguirre said to them, "That's impossible. He was with me." Aguirre testified that he was positive that he picked appellant up around 9:00 a.m. on April 3, and dropped him off at approximately 4:00 or 4:30 p.m. on the corner of Lakewood and Firestone, at "my associate's office."

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[6] Appellant's booking photo, Exhibit C, shows some hair growth, but not so much that would amount to a crew cut.

[7] No license or copy of a license was offered in evidence.

Aguirre testified that on April 3, they inspected two houses, both probably empty, since most inspected houses are in escrow. There were neighbors about, but no realtor, although he had been hired by Louie Corona from Remax.

Aguirre claimed to have maintained documentation regarding the inspections, that he always prepares and signs inspection sheets or inspection tags for each job, and that he gave the documents to defense counsel. Defense investigator Laurin Hayes called him in January 2003, arranged to meet him, and told him to bring anything that would help with the case. He did not bring documents at that meeting, however, and explained to the investigator that he was relocating his office and everything was boxed up. Three months later, Aguirre provided some computer print-outs to the investigator. Aguirre admitted that he had not yet found new offices by the time of that first meeting, however, and he did not move.

Aguirre admitted that he was nervous because this was a gang-related case, and it is apparent even from the cold record that he was a very nervous witness. He testified that a week after the parole office visit, he learned that appellant was accused of murder, not attempted murder. When asked whether he went to the police with the alibi information, he said he did not, since he had already told the parole agents. He added, "I live like six blocks away from where this incident happened, and I don't want to get involved. I'm here because that's what happened. I mean, why would I be jeopardizing my family for a gentleman I don't even know, right? That's what I'm saying, you know. I mean, come on. They said they were going to contact me. I didn't want to press the issue. I mean, people know me around there. I didn't want to get--"

Aguirre denied that what he had told the parole agent was that he had dropped appellant off early on April 3, because he had no more work for him that day. Aguirre spontaneously added that he did not want to be there, that he was

subpoenaed, he lived in Pico Rivera, and knew that this case was about a gang shooting. He claimed that he did not know to which gang appellant belonged, although he has seen the "Rivera Viejo" tattoo on his lip. When asked what "Rivera Viejo" means, Aguirre replied, "I don't associate with no gang. I went to school in Montebello. I went to school in East L.A. I never hanged out in Pico Rivera." Aguirre finally responded that he did not know what "Rivera Viejo" meant, although he admitted knowing what R13 means, and having seen a "Rivera 13" tattoo on appellant.

Aguirre testified a second time, having been called by the prosecution on rebuttal. He testified that his business was called Galtin Termite when it first opened, but was now Olympic Termite.[8] He had lost his license, however, which he claimed was due to a falling out with his partner. He explained that his business was started as a *branch* of Galtin, but he lost "that operator," because it committed fraud.

Aguirre produced two computer print-outs, which he claimed to be copies of the inspection reports for the two jobs done on April 3, 2002, prepared for a buyer, seller, or lender. Aguirre testified that the computer print-outs are dated, but give no time-frame for the jobs. The print-outs were not offered into evidence.

Parole agent Hodges Metcalf testified that he was there when appellant was arrested in his office on April 4, 2002. He spoke to the person who had come in with appellant, identified as appellant's employer. The employer told him that appellant had been at work earlier on April 3, but that they stopped work early because the employer needed to purchase supplies, that he dropped appellant off in Whittier or on Whittier Boulevard in the early afternoon, between 2:00 and 3:00,

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[8] *Galtin* is a phonetic spelling by the court reporter.

and that he did not see appellant after that. Agent Metcalf admitted that he did not inform the detectives about this conversation.

Defense investigator Hayes also testified on rebuttal. He first spoke to Aguirre in June 2002, when Aguirre told him that appellant had been with him on April 3. When Hayes pressed him for specific times or a better breakdown of the time, Aguirre would not commit to supply a chronological timeline, and gave a rambling response. He said, "He was with me all day."

Hayes asked Aguirre for documentation, and he said he would try to obtain it. Hayes attempted to contact Aguirre three times after that, without success, and did not meet with him again until sometime after January 30, 2003. Aguirre gave him a copy of a check, representing that he had given it to appellant for services provided as an employee of the company. Hayes testified that he thought it was a company check, but he did not have the check at trial, and it was not offered into evidence. It was dated February 26, 2002, and made payable to appellant for $136. Aguirre told him that he was searching for other records, but everything was boxed up, and some were computer records.

Hayes spoke to Agent Metcalf on May 20, 2003. He asked whether he had talked to Aguirre, and whether Aguirre had told him he was appellant's boss and that appellant had been with him all day. After referring to his report, Hayes recalled that Metcalf had told him, "yes," and that Aguirre had claimed that he dropped appellant off between 4:00 and 5:00 p.m. on April 3.

Having reviewed the evidence, we turn to the question of whether the victim's status as a member of a rival gang bore on a fundamental part of the prosecution's case against appellant, and whether it "'added critical weight to the prosecution's case.' [Citations.]" (*Douglas v. Alabama*, *supra*, 380 U.S. at p. 420.) Appellant contends that the prosecution needed to establish a gang-related

motive for the shooting in order to bolster weak identification evidence, in light of strong, "perfect" alibi evidence.

First, we do not agree that the identification evidence was weak. Damien knew appellant. They had gone to middle school together, and Damien had seen appellant within two years prior to the shooting. Sheriff's deputies arrived within minutes of the shooting, while Damien was still hysterical, and one of them spoke to him within minutes after arriving. Damien told her that the shooter was Jaime, a person he had known at school called "Boxer." Such spontaneous and unreflecting utterances made moments after a crime by an upset witness are generally considered trustworthy enough to be admissible in spite of their hearsay nature. (See Evid. Code, § 1240; *People v. Poggi* (1988) 45 Cal.3d 306, 318-319.)

Further, Damien was certain when he identified appellant later at the Sheriff's station, and he positively and emotionally identified appellant in court at preliminary hearing. He watched the shooting from only nine feet away, and he believed on the day of the shooting, as well as at preliminary hearing, that his identification was correct.

Appellant suggests that Damien's identification was weak because he recanted at trial. It was Damien's *recantation* that was weak, however, and hardly believable. Damien was concerned that his testimony would "fall back on him." He had *no doubt* about the identification on the day of the shooting, but at trial, he could not even remember what the shooter looked like, other than being male with a bald head, and he gave no explanation why he had changed his mind.

An out-of-court identification has strong probative value where, as here, the recanting witness believed his prior identification and has no explanation for recanting, there is no evidence of a motive to implicate the defendant falsely, the witness was able to observe the perpetrator during the commission of the crime and gave a detailed description of it, and there is evidence that his failure to confirm

the identification arises from fear. (See *People v. Cuevas* (1995) 12 Cal.4th 252, 267-268.)

Appellant contends that Oseguera's identification was weak because his description was incongruous with appellant's appearance, he did not see appellant's facial tattoos, and because he described the shooter at trial as having a light complexion, although at the time of the shooting he described the shooter as having a medium complexion.

Whether appellant's complexion was light or medium was not accorded much importance at trial, since there were no follow-up questions to determine what Oseguera meant by *light* and *medium*; for example, whether he used both simply to denote *not dark*. We have viewed the photograph selected by Oseguera, and appellant's complexion might truthfully be described as either light or medium.

We cannot see from the record how visible appellant's tattoos are in person, but we assume that the jurors, who were able to observe appellant over a three-day period, found its visibility to be a minor issue.[9] We have viewed appellant's booking photo, and the tattoo might easily be mistaken for one or two day's growth of whiskers, but not for a fully grown, or even half-grown, mustache.

Minor inconsistencies cannot significantly undermine a positive identification. (*People v. Lewis* (1947) 81 Cal.App.2d 119, 124.) Oseguera was able to get a good look at the shooter, and his identifications, both in court and on the day of the shooting, were positive.

Nor do we agree that appellant's alibi evidence was strong. Aguirre appeared fearful and evasive. He was unable to provide documentary evidence of

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[9] We also note that Aguirre testified that appellant had been letting his mustache grow. It cannot be discerned from appellant's booking photo whether the shadow on his upper lip includes whiskers or is simply his tattoo.

appellant's employment for more than one week in February, and although he claimed to work in a field requiring him to submit inspection reports suitable for escrow, he could not produce copies of any reports that he actually submitted for placement in any identified escrow.

Aguirre testified that he owned his own company and was licensed for the work. Then he testified that it was a *branch* of another company, and that he owned the branch, but he lost it and his license because the operator of that company committed fraud. No license, or evidence of an expired or revoked license, was ever produced. Termite inspection is a highly regulated business. (See Bus. & Prof. Code, §§ 8500, et seq.; *Seelenfreund v. Terminix of Northern Cal., Inc*. (1978) 84 Cal.App.3d 133, 137-138.)

Aguirre accompanied appellant to the parole office on April 4, at appellant's request, in order to show that he was working. One might well doubt appellant's motive in choosing the day after the shooting for this introduction, when appellant had apparently been hired at least two months before, and even though, as appellant's parole agent Enrique Martinez testified, parolees ordinarily provide pay stubs to prove employment.

Aguirre testified that he dropped appellant off at Lakewood and Firestone at 4:00 p.m. Agent Metcalf testified that Aguirre told him that he dropped him off in Whittier or on Whittier Boulevard between 2:00 and 3:00. Aguirre would not give defense investigator Hayes a specific time at all.

And none of Aguirre's times make sense in relation to his testimony regarding the time he normally took to do his work. He testified that he usually brings a lunch, because he is so pressed for time that he eats on the job. Aguirre testified that he picked appellant up in Rowland Heights at 9:00 a.m. on April 3, 2002, although he told Hayes that appellant was with him by 8:00 a.m. They inspected two houses. One was located on East 57th Street in Los Angeles, and the

other was also in Los Angeles, but Aguirre could not say where. They reached the first house at 10:30 or 11:00 a.m., and the inspection took two and one-half hours. The second house took only one hour, forty-five minutes, and Aguirre dropped appellant off just fifteen minutes later. If Aguirre's timeline is to be believed, it took him between two and three hours to travel to the first house, one-half hour to the second, and just fifteen minutes to travel where he dropped appellant off. Such a schedule may be possible in Los Angeles, but without an explanation, we cannot agree that it is strong evidence of a perfect alibi.

We do agree with appellant that it was important to the prosecution's case to prove a gang-related motive. The amended information alleged that the murder was committed either for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further and assist in criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b)(1). We cannot find, however, that Deputy Peralta's testimony "'added critical weight to the prosecution's case.' [Citations.]" (*Douglas v. Alabama*, *supra*, 380 U.S. at p. 420.)

The evidence of a gang-related motive was overwhelming: appellant shouted it out for all within hearing to know. Appellant, a known gang member, yelled "Rivera," after arriving in rival gang territory with three or four companions, which indicated, in Detective Nava's opinion, that they were also members of the Rivera Gang. Although the nearby graffiti told them that they were in the territory of the P.N. gang, appellant asked, "Where are you from?" Or he may have asked, "Are you from P.N.?" Nava testified that either question was a sign of disrespect under the circumstances, which amounted to a show of dominance superiority intended to benefit the Rivera gang. And shooting rival gang members in front of one's "homeboys" would gain higher status for appellant in his own gang.

It may be reasonably inferred from the evidence that appellant at least *believed* that Santa Anna was a gang member. Appellant knew that he was in rival gang territory, since he found it appropriate to yell out the name of his own gang, and he was acquainted with Santa Anna. Further, it is unlikely that appellant asked Santa Anna where he was from in order to obtain information he did not already have, because when Santa Anna replied, "I don't bang. I'm not from nowhere," appellant shot him anyway.

Even if there had been no evidence of Santa Anna's affiliation or lack of affiliation, such evidence would not contradict the showing that appellant's motive was to benefit his gang or gain status in his gang, but would merely establish that appellant had been mistaken, and Santa Anna had not been a member of any gang, or that he was correct in thinking Santa Anna was a rival gang member. Thus, Santa Anna's statement to Peralta that he was a P.N. member was not necessary to this part of the prosecution's case, and could not have unfairly prejudiced appellant. (See *Douglas v. Alabama*, *supra*, 380 U.S. at p. 420.)

Given the strength of the identification and other motive evidence, it is not reasonably probable that the jury relied on evidence of Santa Anna's gang affiliation to convict appellant. We conclude that the admission of Peralta's testimony, if error, was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Appellant also contends that Santa Anna's statements were hearsay, and did not fall within an exception to the hearsay rule. The erroneous admission of hearsay requires reversal only if it appears reasonably probable that admission of the evidence affected the verdict. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1220; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Since we have already found that it is not reasonably probable that the jury relied on evidence, and that the admission of the evidence harmless beyond a reasonable doubt, it is not reasonably probable

that admission of the evidence affected the verdict, and we need not determine, therefore, whether its exclusion was required by the hearsay rule.

2. *Sentencing Errors*

Appellant contends that the trial court should not have impose a ten-year gang enhancement under Penal Code section 186.22, subdivision (b)(1)(C), in addition to the 25-years-to-life term imposed under section 190, subdivision (a). We agree. Section 186.22, subdivision (b)(1)(C) does not apply to violent felonies "punishable by imprisonment in the state prison for life." (Pen. Code, § 186.22, subd. (b)(5).) The California Supreme Court has recently resolved a conflict among the courts of appeal in favor of the applicability of this exception to terms of 25 years to life for first degree murder. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1005-1007.)

Appellant contends that the trial court erred in refusing to award credit for actual time served awaiting trial and sentencing. Respondent agrees. A person convicted of murder may not receive conduct credits. (See Pen. Code, § 2933.2, subd. (a).) But he is entitled to credit for all presentence time spent in custody. (Pen. Code, § 2900.5, subd. (a); *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1365-1366.) The trial court calculated that time as 589 days. Appellant contends that it is 590 days, since custody credit must include both the day of arrest and the day of sentencing. (*People v. Smith* (1989) 211 Cal.App.3d 523, 525-526.) Appellant's calculation is the correct one.

DISPOSITION

The judgment is modified as follows: appellant is awarded 590 days credit for presentence custody; and the ten-year enhancement imposed pursuant to Penal Code section 186.22, subdivision (b), is stricken. The trial court is directed to

amend the abstract of judgment accordingly and to forward a copy thereof to the Department of Corrections. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, P.J.

CURRY, J.